

On social regionalism in transnational labour law.

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**Abstract:** *This article historicizes social regionalism as a principled and pragmatic response to the breakdown of the embedded liberal bargain and the encasing of an international economic order that was designed to prevent the governance of the social in the economic, transnationally. Seen in historical context, the first labour chapter arbitral panel report under the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR) illustrates the need to shift focus, to social regionalism. Social regionalism enables trade*

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*treaty interpretation to focus on shared objectives. It moves beyond, to promote redistributive mechanisms and international solidarity within trade agreements.*

**Keywords:** *social Regionalism, transnational labour law, distributive justice, trade regulation, embedded liberalism, treaty interpretation, inequality, international solidarity.*

## 1. Introduction

Social regionalism could not be more important in the midst of a global pandemic, record levels of inequality, and deepened social discontent. The contemporary trade architecture is far from delivering on its promise of raised standards of living, full employment, and sustainable development (WTO/Marrakesh Agreement, 1994). Referencing this multilayered ‘inequality pandemic’, U.N. Secretary General António Guterres has called for a global new deal, consistent with the International Labour Organization (ILO)’s foundational 1919 constitutional recognition that “universal and lasting peace can be established only if it is based upon social justice”. Fundamental rethinking requires us to address the prevalent misrepresentation of the appropriate governance level for labour as a purely domestic matter. Social regionalism offers a powerful contribution, by offering an alternative vision of labour governance in regional trade, which includes distributive justice beyond national borders.

This paper starts by briefly historicizing social regionalism, to convey the nature of the challenge of rethinking labour and distribution, regionally. The historicization challenges the assumption that labour was naturally thought to be a domestic governance concern. Instead, the encasing of the economic liberalism transnationally, was planned. Transnational labour law

takes the ensuing deep asymmetry in the construction of the economic – and financial – architecture as an analytical starting point.

Building on that starting point, the primary focus in regional trade agreements on failures to enforce national labour laws is called into question in Part II, through an in-depth analysis of the concerning 2017 Dominican Republic – Central America – United States Free Trade Agreement Arbitral Panel Established Pursuant to Chapter Twenty, In the Matter of Guatemala – Issues Relating to the Obligations under Article 16.2.1(a) of the CAFTA-DR (LPR). The behemoth that is the final report of the dispute resolution panel of 14 June 2017 came, at the outset of North American Free Trade Agreement (NAFTA) renegotiations. This first decision issued by an arbitral panel interpreting a labour clause in a free trade agreement in the 25-year history of such clauses could hardly have crystallized better the concerns that there is a profound mismatch between trade and labour. It was a deep disappointment for advocates of enforceable social clauses in trade agreements, and has come to epitomize the need to reconsider the broader political economy of regional trade agreements to redress the historically constructed asymmetry between trade and labour.

The final part of the paper calls for a thick understanding of social regionalism both in treaty interpretation, and in treaty design. It argues for regions to reconsider the appropriate governance level for labour redistributions, that is, adjustment costs for social protection, in trade.

#### Part I: Understanding Social Regionalism Historically

If the LPR is a disappointment, the intellectual history explains why the trade-labour mismatch is not simply a matter of “getting the decision right” from an interpretive perspective, or “getting the wording right” from a treaty negotiation perspective. This is a deliberately alternative but critical way to understanding the story of regional integration, and the path dependency that has

surrounded how it is governed. That is, this history turns attention to the way in which economic regulation transnationally has been encased, to seal out the social.

By affirming that “[l]aissez faire was planned” (p.147), Karl Polanyi captured how the state – in all its complexity and in the growth of administrative law forms of control - was crucial to the establishment and management of market economies, and necessary to provide the social protection that could preserve both “man and nature” (p.138). Polanyi’s double movement was “personified” in the actions of two organizing principles in society. First, economic liberalism<sup>1</sup> aimed to establish a self-regulating market relying on “trading classes” but second, “social protection” aimed to conserve both “man and nature” alongside “productive organization.” (Polanyi, 1944/2001, p.139). In other words, self-regulating market utopianism was, through persistent countermovement, “stopped by the realistic self-protection of society” (pp. 148, 150). Polanyi’s close reading of class relations in the 19th century allowed him to underscore the ways in which “each social class stood, even if unconsciously, for interests wider than its own.” (pp. 139, 169). He could also frame the social history of the clash between both organizing principles and social classes out of which early 20th century fascism emerged.

Polanyi considered that the ILO’s role was in part to “equalize conditions of competition among the nations so that trade might be liberated without danger to standards of living” (Polanyi, 1944/2001, pp.27-28). Although Polanyi wrote primarily about the pre-war, 19th and early 20th century, the relationship between employment and trade policies was “widely appreciated” in policy circles of industrialized market economies in the post-war period (Gardner, 1956,

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<sup>1</sup> Polanyi dates the emergence of ‘economic liberalism’ to the 1820s, and has it stand for three tenets: “that labor should find its price on the market; that the creation of money should be subject to an automatic mechanism; that goods should be free to flow from country to country without hindrance or preference.” At the time, this was “in short, for a labor market, the gold standard, and free trade.” (Polanyi, 1944, p.141).

p.104; Ruggie, 1982). That relationship shaped the international economic architecture that was proposed but never adopted. The Havana Charter's International Trade Organization (ITO) would have acknowledged that "all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions"; committed members to engage in "appropriate and feasible" action to eliminate unfair labour conditions; fostered "regular exchange of information and views among Members" in cooperation and deliberation with the ILO; and subjected respect to the ITO's nullification and impairment provisions (United Nations/Havana Charter, 1948, arts. 2(3), 5(2) & 7(1)).

Instead, states' commitment to embedded liberalism's juxtaposition of market liberalization multilaterally with social protection as a domestic governance matter reflected the 'varieties of capitalism': from coordinated market economies with sophisticated protection systems – like Germany, Japan and Sweden - to liberal market economies seeking flexibility through controlled decentralization – like the United States, the United Kingdom and Australia (Hall and Soskice, 2004/2001?). A key insight has been that with global competition, states prosper "not by becoming more similar, but by building on their institutional differences" (Hall & Soskice 2004/2001, p.60; Hepple, 2005). But beyond the equilibrium between liberalization and domestic stability, "[p]revailing social expectations, norms and economic ideas", widely shared by a core of like-minded governments, sustained embedded liberalism (Ruggie, 2008, p.2). Rather than seek to re-embed what was bargain inherently exclusionary of most of the global South, contemporary thinkers have sought to reframe the social purpose of contemporary trade relations (Lang, 2006; 2017).

As part of a reframing, Quinn Slobodian explains the rise of neoliberalism in an "ever morphing global capitalism" on its own terms (2018, p.20). He underscores the extent to which

the intellectuals comprising the Geneva School of globalists of the 1930s<sup>2</sup> sought state action: “the choice was not between a governed nation and an ungoverned world economy” (ibid., p.19). These early neoliberals acted to ensure that the market was re-embedded, but not to promote humanity and social justice. Rather, hardened global regulation served to “prevent state projects of egalitarian redistribution and secure competition” (ibid., pp. 19, 123). They helped to undermine the International Trade Organization and any other effort toward a global New Deal including global South calls in the 1970s for a New International Economic Order (NIEO) (ibid., pp. 129-133; 157-160),<sup>3</sup> although the reference to full employment was retained in the incrementalistic approach to trade liberalization captured through the ratification of the GATT. They ensured that trade rules and international and bilateral investment agreements would create hardened, constitutionalized legal frameworks that limited redistributive options while promoting a particular kind of stability (ibid., p. 184). While supporting democracy for the possibilities of peaceful change, they were concerned about mass democracy’s ability to up-end order. They sought to “inoculate capitalism” against the redistributive demands of social justice (ibid., pp. 14, 2, 20, 133, 272). For these reasons, Slobodian refers to the “encasement of the market in a spirit of militant globalism” over Polanyi-inspired references to “disembedding” (ibid., p. 18), and emphasizes both the post-fascist and post-colonial contexts.<sup>4</sup> For Slobodian, “the end of global empires was essential to the emergence of neoliberalism as an intellectual movement” (ibid., p. 14). Yet “unfettered” national sovereignty was a problem: neoliberalism required nations to “remain embedded in an international institutional order that

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<sup>2</sup> Notes Slobodian (2018):

[w]hen the GATT moved into the former headquarters of the International Labour Organization in 1977, they renamed the building the Centre William Rappard after the Swiss neoliberal and host of the first Mont Pèlerin Society meetings in Geneva in the 1930s and 1940s. (pp. 23, 240 – 241).

<sup>3</sup> For Röpke, inequality is an “unavoidable characteristic of capitalist society”. Attempts to apply industrial policies, and global social welfare, would be both unworkable and unwise (Slobodian, 2018, p. 160).

<sup>4</sup> Slobodian offers a revelatory map of the Geneva School’s various positions taken on race, white supremacy and apartheid in South Africa (2018, pp. 150 – 153, 172 – 174, 177-178).

safeguarded capital and protected its right to move throughout the world” (ibid., pp. 9; 147). Law was needed to safeguard the distinction between the private world of property and the public world of states, or territory (ibid., pp. 138, 140). Not all institutions should be transnationalized, therefore; getting the institutions right mattered. More so even than economics, it was statecraft and law that were critical to the globalists’ project (ibid., p. 9). The language of human rights could be co-opted, to undermine social justice focused interpretations that centred notions like “full employment” and “social and economic rights” and that instead, marshalled, for example, the human right to leave a country with one’s belongings as a basis for challenging capital controls and expropriations by enshrining investors’ rights (ibid., pp. 134 – 136, 142).

Under this vision, an institution like the ILO that centres social justice and workers’ rights could become deeply problematic. We know, however, that when institutional mechanisms and legal forms were applied flexibly, in the more limited context of intra-capitalist institutional diversity in multilateral trade, substantive consensus could be retained. But the GATT changed its character such that with a more formal, technocratic turn, struggles over a neoliberal direction played out at a technical level (Lang, 2011, pp. 213-217; 252-272; Howse, 2017). As economic integration has deepened and investment protections hardened even amongst developed countries, embedded liberalism has come to be seen as an economically and politically unstable compromise: the postwar international regime was designed to accommodate welfare state policies, not to sustain a transnational challenge to those policies’ dismantling. Rather, in the context of global re-structuring, it is the short-term mediation of the social in the economic during the period of embedded liberalism in the global North from the post- World War II period to approximately the Oil Crisis in 1979 that is the

aberration.<sup>5</sup> Deepened integration through the expansion of multilateral and regional trade and investment agreements has not led to a commensurate deepening of social welfare policies and labour rights, domestically or crucially transnationally, notably at the regional level.

Moreover, attempts to apply Hall and Soskice's analysis to developing countries have not always considered the care with which the authors limit their own analysis to selected industrialized market economies, even omitting low-income OECD members like the Republic of Korea and Mexico, and placing "Mediterranean" countries including France, Greece and Spain in an ambiguous position given in part their large agrarian sector. Polanyi acknowledges the abject commodification of the labour power of colonial peoples, noting that the ability of workers to seek state protection in the global North was out of reach for colonized peoples, so long as they lacked the "prerequisite, political government" (Polanyi, 1944: 192). Not only was sovereignty the shield that the colonized did not yet have. The colonial preferences afforded to the metropolitan, European territories of the global North essentially supported their embedded liberal policies, establishing distributive policies along citizenship lines, while the terms of citizenship were denied to the citizens of "sovereign" former colonies in a neocolonial order. A correlation is the failure to grapple meaningfully with the fact that some states, typically in the global South, were never able to provide the kind of social welfare mechanisms that were enjoyed, for a time, in the global North as measures to cushion their societies from market exposure (Ruggie, 2008; Blackett, 2010; Fraser, 2013). The structural dimensions of underdevelopment (as opposed to modernization theory) needed to be engaged. While agricultural subsidies were the flagrant example in the Treaty of Rome of 1957, the full latitude of WTO member States to exempt liberalization of the movement of persons from trade discipline under the WTO General Agreement on Trade in Services (GATS), Mode 4, rather

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<sup>5</sup> See (Özsu, 2020) (offering important counterpoint to received narratives on OPEC, recalling the relationship between its production policies and its members' support for the 1974 New International Economic Order (NIEO)).

than a trade framework recognizing a reasonable market access for foreign labour subject to trade disciplines underscores the uneven exchange (Lee 2006: 135 – 138).

That said, after looking closely at the commodities trade, the role of the United Nations Conference on Trade and Development (UNCTAD) and alternative development theorizations that accompanied extra-GATT approaches to trade, Michael Fakhri argues that the embedded liberal compromise “had more room for development concerns than originally described” (Fakhri, 2014, p.147). Slobodian similarly paints a picture of developing countries’ simultaneous advocacy of special and differential treatment or other forms of protection, alongside liberalization, arguing that developing countries “used all policy tools available to them, including GATT” (Slobodian, 2018, p.202).<sup>6</sup>

Ultimately this brief history helps to explain why the various generations of regionalism that emerged since the post-War period as a form of transnationalism did not yield the kind of market encasing path dependency that characterizes many current trade arrangements – from bilaterals to megaregionals, and including the CAFTA-DR and the USMCA. Indeed, some early trade regionalism tried to address transnational adjustment directly: Accession to the European Communities by Greece in 1981, and Spain and Portugal in 1986 was accompanied by significant expansion of the Structural Fund and ultimately the creation of the Cohesion Fund (Guillén, Álvarez and Silva, 2003; Topaloff, 2012). In contrast, in the face of the Eurozone comprising significantly different economies, economic shock was never unlikely. Stiglitz notes the similarities to structural adjustment in the developing world, and argues that

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<sup>6</sup> This included using the Haberler report on GATT compliance on the European Economic Community’s relationship to French colonies, in the EurAfrica agreement. It created conditions opposite to those liberal theorists expected: Global South scholars used it to challenge “one-size-fits-all application of trade rules” (Slobodian, 2018, p.204). Preferential treatment was extended through the Yaoundé, Lomé and Cotonou agreements with African, Caribbean and Pacific countries (Sakr, 2020) and special and differential treatment under the GATT. Demands deepened for a New International Economic Order (NIEO) under the United Nations (Slobodian, 2018, p.220).

the Eurozone required something it has not yet developed: social solidarity across borders so that members could, willingly, share the burden of the crisis through shared financing of adjustment measures - social safety nets – to enable a country like Greece to weather the storm (Stiglitz 2017/2016: 232-234).

The regional is therefore not so much an intermediate space between the domestic and the international or multilateral or ‘global’, as it tends to be conceived; rather, it is a way to shape the transnational and act through it, that is, beyond, between and through states. States matter, as do their choices and prospects for reimagining the spaces for the social in the economic. It is with this thick understanding of the landscape out of which a CAFTA-DR emerges that the surreal character of the first trade-labour dispute resolution decision can most readily be appreciated. LPR is a long way from what a deep understanding of the social in the economic can and should mean.

## Part II: Guatemala - CAFTA-DR and the limits of the “trade and” approach

To do justice to the LPR, and to convey the extent of its distance from social regionalism, it is necessary to pay close attention to the procedural dynamics and key interpretations and findings before considering key points of treaty interpretation. Some commentators’ main takeaway is that trade dispute resolution is inappropriate for labour law (Pauwelyn, 2017). My critique is other. The process and treaty interpretation illustrate what the intellectual history conveys: the rationale for addressing labour transnationally, through trade, must be explicitly understood and must inform interpretation.

## Procedure and Findings in the LPR

The long road to an arbitral panel in a climate of fear

The LPR process was long: by the time the LPR was issued, more than nine years had passed since the US country contact-point, the Office of Trade and Labor Affairs (OTLA), received its first submission from the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) regarding a CAFTA-DR country, concerning Guatemala (US Submission 2008-1).

The submission included five individual cases organized around the workers' organizations that signed the submission, alleging serious and repeated failures by the government of Guatemala to respect Section 16.2.1(a) of the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR) requirement of effectively enforcing labour laws. The signatories also considered that the statement of shared commitment under Article 16.1, which specifically refers to obligations as members of the ILO and commitments under the 1998 Declaration on Fundamental Principles and Rights at Work and Its Follow-Up (1998 Declaration), was violated. The submitters took pains to clarify that the five cases “represent only a handful of the many labor law violations in Guatemala”; that “each of these claims, together and individually, set forth facts sufficient to establish a recurring course of action or inaction on the part of the government”; and that the failures affect trade between the U.S. and Guatemala (United States Department of Labor/U.S. Submission 2008-01, p. 3).

The choice of sectors - workers at a major port that handles exports destined for the United States and companies that export goods to the United States - shows the attention turned

by the signatories to the language of Article 16.2(1)(a).<sup>7</sup> The focus was on the freedom of association, and the submission included some of the most serious allegations of systematic violence: the murder of trade union leaders, with impunity, as well as death threats to others and reported intimidation by employers in light of the death threats. Annex A included a list of trade unionists and their family members who were the “victim of acts of extreme anti-union violence from July 2006 to the present,” (U.S. Submission 2008-01, pp. 4, 7, 17, 24-25). The allegations included the murder of seven members of the Guatemalan Izabal Banana Workers’ Unions (SITRABI), one of the unions to have co-signed the 2008 submission.

The submission also alleged that factory owners were routinely able to deny labour inspectors entry to enforce labour laws. Even when labour inspectors did enter, the submission alleged, there was no follow up on reported violations. The submission also underscored the ineffectiveness of court orders that were rarely enforced. Throughout the submission, international labour standards (ILS) and the reports of the ILO’s Freedom of Association committee and the ILO’s Committee of Experts on the Application of Conventions and Recommendations were repeatedly referenced.

OTLA issued the public report of review on 16 January 2009. Despite acknowledging the impact of technical cooperation, it acknowledged the persistence of a climate of fear, adding that “when a union leader is violently attacked with total impunity, the crime’s impact can reach beyond the individual and cast a shadow of fear upon others, weakening the right of association and collective bargaining” (United States Department of Labor/Public Report of Review, 2009, p.31). It recommended a number of steps to effectively enforce labour laws, which included enforcing outstanding arrest warrants in the murders of trade union members and the conduct

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<sup>7</sup> The language “in a manner affecting trade between the Parties” added to “[failure] to effectively enforce its labor laws, through a sustained or recurring course of action or inaction” was first inserted in the U.S. Jordan Free Trade Agreement in 2000.

of criminal proceedings. While it did not recommend consultations pursuant to Article 16.6.1 of the CAFTA DR, these would come. The matter was essentially passed on to the incoming administration of President Obama (Church Albertson & Compa, 2015, p.481), which took a further 18 months to act, at least publicly, to invoke cooperative labour consultations in July 2010.

An arbitral panel was constituted on 30 November 2012 (LPR, para. 3), was suspended pending the negotiation and implementation of an Enforcement Plan signed in April 2013, and suspended repeatedly to give Guatemala time to implement. Finally, the US decided again to proceed to dispute settlement on 18 September 2014 (*Office of the United States Trade Representative/USTR*, 2014).

### Control over Framing Labour Violations

Three shifts operated that affected control over the framing of labour violations. First, the 3 November 2014 U.S. Initial Written Submission supporting the request for an arbitral panel pursuant to Article 20.6 of the CAFTA-DR was procedurally the United States' alone, and not that of the workers' organizations that initially brought the Chapter 16 submission. Second, there was an administrative shift – from OTLA in the Department of Labor, to the United States Trade Representative (USTR). Third, the arguments shifted. In particular, that LPR does not even mention the systematic use of violence that was such a significant part of the initial labour submission and documented by decisions of the ILO's Freedom of Association Committee is not surprising, as neither did the original US complaint from November 2014: the USTR argues that it “does not apply to enforcement failures that have no effect on trade between the parties, such as labor enforcement issues relating to government workers or civil servants whose work does not involve the production of goods or the provision of services entering cross-border commerce.” (LPR, para. 478). The summary of the procedural history in the U.S. Initial Written

Submission even omits OTLA's discussion of impact of the criminal violence. (Cross, 2017:25). Cross takes issue with the affirmation: how could it not affect trade, is Cross' argument in essence. Should it not colour any interpretation given to Article 16.2(1)(a), in context?<sup>8</sup>

### A Deeply Contested Dispute Resolution Process

From the starting issue of admissibility (LPR, paras. 74-106), the dispute was replete with contestations,<sup>9</sup> lending credence to concerns that there was a mismatch between the stated goals of the labour chapter and dispute resolution-based intervention. For example, despite the detailed and nominate information in the trade unions' initial submission, the U.S. Initial Written Submission contained heavily-redacted information. The U.S. explanation was confidentiality. The government of Guatemala repeatedly challenged the redacted information, even affirming that the redactions were not in good faith (LPR, para. 240). Ultimately the Panel majority found that it was "without authority to instruct the United States to submit unredacted copies" (LPR, para. 22 and Annex 1, paras. 30 – 34, Annex 2), considering the matter to be a question of probative value in the decision on the merits. And those redacted documents ultimately did not fare well ((LPR, paras. 229 – 232).<sup>10</sup>

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<sup>8</sup> Cross reports that the AFL-CIO challenged the USTR's omission in April 2015. While the USTR "later backtracked on the 'rule of law' argument" (Cross, 2017: 24), the allegations of murder of trade unionists and the surrounding impunity and climate of violence and threats were not added to the proceedings.

<sup>9</sup> A panelist even resigned and although a new panel was reconstituted, no new hearing was held but several extensions were granted.

<sup>10</sup> The panel expressed concern over the U.S.'s decision to task the ICSID Secretary-General essentially to do the panel's job; instead, the panel should have been able to make a finding of fact based on its own review of the best available evidence – if necessary, *in camera* or even through a third party identified by the panel itself (LPR, paras. 260 – 266). The evidence was considered "seldom probative" (LPR, paras. 232 & 234), unless corroborated – for example by court orders (LPR, para. 294). Coupled with the stark and inhabitual way in which the burden of proof was interpreted to be borne by the complainant pursuant to Rule 65 (Pauwelyn, 2017), Guatemala could

Another source of contestation concerned democratic participation in dispute resolution. The panel received requests to submit written views from a number of non-governmental organizations and trade unions, including a signatory to the initial 2008 submission, the AFL-CIO, pursuant to Rule 54 of the Rules of Procedure for Chapter 20 of the Dominican Republic – Central America – United States Free Trade Agreement (Rules of Procedure). Neither the U.S. nor Guatemala objected, so the Panel granted all but one of the requests.<sup>11</sup> Ultimately though, the Panel considered most of the views to be “informative” but “not directly relevant” to the legal interpretation, as required by the Rules of Procedure (see also Paiement, 2018, p. 685). Yet the views were acknowledged to focus on the “institutional, economic, social, and political context” of the dispute (LPR, para. 108). The tenor of the decision itself suggests that the legal interpretation – and its explanatory function about the adjudicators’ understanding of the democratic legitimacy dimension -- might well have been enriched had it drawn on contextual analyses and adopted a more fulsome definition of legal interpretation.

### Key Interpretations and Findings

At the outset, a contextual and purposive interpretation in keeping with the Vienna Convention on the Law of Treaties (VCLT) <sup>12</sup> was affirmed as guiding the Panel’s interpretative exercise.

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mostly hold fast to its right not to adduce evidence without giving rise to an adverse inference (*LPR*, para. 316). But in a case when Guatemala did not contest the US claim on unenforced reinstatement orders, but rather sought to justify the delays, the panel was able to conclude that the orders remained unenforced (*LPR*, paras. 319-320; paras. 334-335).

<sup>11</sup> The Trade Union Confederation of the Americas did not meet the Rule 53 requirement to be located in the territory of a CAFTA-DR party.

<sup>12</sup> U.N.T.S., vol. 1155, p. 331.

The Panel also acknowledged the Statement of Shared Commitment found in Article 16.1 CAFTA-DR, and considered to be an “essential part of the obligation” (LPR, paras. 166, 170 & 186). However, the three key interpretive findings underscore the distance between this decision and the insights on why trade-labour linkage through social regionalism is important.

#### Failure to Effectively Enforce its Labour Laws

It has been aptly observed that the failure to enforce is not the usual stuff of trade dispute resolution. While it might be possible to “get away with” some kinds of evidentiary issues linked to enforcement in other trade dispute resolution cases, the focus of the labour chapter underscored a gap in evidentiary rules in trade dispute resolution. (Van der Ven, 2017). Overall, the U.S. was found to have proven that in eight worksites the government of Guatemala had failed to effectively enforce its labour laws (LPR, para. 594). Only one of the many labour inspection allegations was considered to have been established (LPR, para. 588). The panel refrained from undertaking a broad examination of the functioning of the Guatemalan labour courts or labour administration, beyond the specific allegations of failures to effectively enforce labour laws. It also recalled the limits of its own process as adopted by the CAFTA-DR parties, which prevented the panel from calling witnesses.

The panel did decide that the obligation in Article 16.2.1(a) is not limited to conduct of Guatemala’s executive body, as Guatemala had argued, but this is not surprising. Importantly, the panel came to this conclusion by assessing the terms “in accordance with the ordinary meaning of its terms in context and in light of the CAFTA-DR’s object and purpose,” (LPR, para. 114, 115-121), an allusion to interpretation on the basis of VCLT. The VCLT is cited at a later moment, in reference to WTO Appellate Body decisions that apply it. Using a similar approach, the negative obligation to “not fail to effectively enforce” was accepted to impose “an obligation to compel compliance with labor laws” so that it can “reasonably be expected

that employers will generally comply with those laws” with other employers able to expect the same (LPR, para. 139). This kind of contextual, purposive approach seems to have been occasionally articulated but not necessarily followed throughout the decision-making.

### Sustained or Recurring Course of Action or Inaction

Since only one violation of labour inspection was found, the next step almost seemed scripted. A sustained or recurring course of action or inaction required “repeated behavior or prolonged behavior by enforcement institutions displaying sufficient similarity or consistency across instances or over time.” Moreover, if multiple instances, time or place needed to be sufficiently proximate to “be treated as related institutional behavior”. (LPR, para. 590; para. 148). It refrained from finding that a single instance cannot constitute a sustained course of action or inaction. Yet the framing remained theoretical, as the Panel seemed to require the failure to be characterized by “consistent conduct by law enforcement authorities over a prolonged period of time” (LPR, para. 591). The September 2007 inspection incident did not meet that test, and was merely a “discrete instance of failure” (LPR, para. 591). It is worth adding that the panel concluded that it had no jurisdiction to admit evidence of breach that took place after the panel was requested. It only conceded that the evidence might be relevant to establish that a breach – as found by the Panel - is continuing (LPR, paras. 593, 430).

Ultimately, the number of similarities among different enforcement failures – 74 workers at 8 worksites over a 5 year period – struck Panel members as “small enough... to make it difficult to discern a line of conduct or behavior indicating a greater likelihood of failure to enforce than would be expected on the basis of a set of isolated events” (LPR, para. 443). But that did not resolve the matter; the third consideration was conclusive.

## In a Manner Affecting Trade

Commentators have expressed surprise at the “extremely demanding interpretation” (Polaski, 2017) that the arbitral panel applied to “in a manner affecting trade between the Parties.” They decided it means the “confer[ral of] some competitive advantage on an employer or employers engaged in trade between the Parties” (LPR, para. 190). To avoid doubt, the panel elaborated: “this determination does not depend on the weight or significance of that employer within its particular economic sector.” (LPR, para. 190). However, the clarification was at odds with the written view expressed by the Cámara del Agro (LPR, para. 190, and footnote 138). The panel would seem to cast some doubt on its own framing, moreover, when it subsequently acknowledged that some failures to enforce might have an effect that is so brief, localized or small to confer a competitive advantage (LPR, para. 193). The key, of course, is that the textual language of “affecting trade” is long gone from this interpretation. The concern that “only a small number of workers for a short period of time” might be affected leads the Panel away from “affecting trade” and toward its substitution: “competitive advantage”. The Panel subsequently makes explicit the view that follows, but that is jarring from a labour law perspective: a chain of labour relations consequences – like a reduction in workers’ bargaining power - will not necessarily flow every time there is a failure to effectively enforce labour laws (LPR, paras. 483-484).

It is also instructive to consider how the panel interpreted the evidence. In one case, the Panel found that the evidence must enable it to conclude, on a balance of probabilities, first that the Guatemalan exporters shipped from a particular port (Port of Quetzal) to other CAFTA-DR parties, and at the relevant times. Second, a shipping company or shipping companies needed to be “affected by the alleged failure to effectively enforce provided services to such exporters”. Third, it was necessary for the costs of the shipping company or companies in question to have been reduced by the failure. And fourth, the cost savings would need to have been passed on to one or more of the exporters (LPR, para. 454). The discussion also turned back to the size

of the companies – or rather, their market share in the ports, which could allow a decision to be made on an inference. (LPR, paras. 458 – 459). The panel found that the U.S. had not met its burden of proof (LPR, para. 455).

Not only does the analytical approach taken by the panel seem at a distance even from those adopted by the WTO. The Panel also declines to draw inspiration from dispute settlement reports discussing the use of the language of “affecting trade” in the WTO Agreement, as it has been interpreted in WTO Appellate Body decisions - notably the part of the provision in GATT 1947 incorporated into GATT 1994 on national treatment, Article III:4 (“shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale”) and the provision on the scope of GATS Article I:1 (“This Agreement applies to measures by Members affecting trade in services”), on the basis that the function of the terms is different in those provisions. While noting that the WTO cases interpreting Art. III:4 tend to focus on how to understand the notion of “like products”, as discussed below, the generative nature of WTO decision-makers’ grappling with that language in the light of broader public policy or sustainable development goals – including SDG 8 on decent work (Novitz, 2020) - did not appear to inform the decision-making (LPR, paras. 186 -189).

#### The LPR, Social Regionalism and Treaty Interpretation

Did the CAFTA-DR lack the architecture that could allow treaty interpretation via LPR to enhance social regionalism? The Panel certainly considered the objectives of the CAFTA-DR as a whole, including the Article 1.2.1(c) concern to “promote conditions of fair competition in the free trade area” (LPR, para. 171). Curiously, though, the panel’s accompanying footnote affirms that “Article 16.2.1(a) does not serve in any direct manner any of the other Agreement objectives identified in Article 1.2.1.” In a decision that takes pains to discuss the definition of

even the most commonly understood words, it is surprising that the opportunity to address the relationship between the enforcement of labour laws and the broader objectives of the free trade agreement seems to be overlooked. The chapeau of Article 1.2.1 anticipates that there are more specific principles throughout the Agreement, which find expression in broader objectives like eliminating barriers to trade or creating adequate and effective procedures to implement and apply the CAFTA-DR. By focusing immediately on “fair competition”, the Panel’s vision of the objective sought through the words “in a manner affecting trade” was immediately limited to one, rather than a comprehensive and cohesive – indeed interdependent - understanding of the articulated objectives of the agreement. Moreover, the opportunity to discuss what fair competition might mean when the language is applied to labour law or sustainable development more generally, rather than, for example, to anti-dumping law, was lost, despite the careful doctrinal work that had been undertaken over the past two decades to frame fair competition and understandings of the labour-trade interface in a manner that embraces the multiple meanings of the terms (see Langille, 2020).

For example, in the context of the transition from GATT to WTO dispute resolution, there has been a move toward a balancing approach in the face of policies of a different texture, but understood to be fundamental to the parties, and to be reconciled rather than artificially sealed out. The implication is that adopting too restrictive an interpretation runs the risk of overburdening the free trade agreement by preventing it from dealing – internally – with challenges that will invariably arrive in a complex text in which multiple objectives are pursued and principles articulated. A perceived inability to address serious issues like labour law violations internal to the text is likely also to raise legitimacy challenges. And while outcome matters, the legal reasoning itself – that is, the ability to grapple deeply, or in the terms of the VCLT, analyze in good faith the ordinary meaning of the treaty’s language in light of the objects and purposes, to provide meaning through the decisions, rather than wordsmithing (see e.g. paras. 181 – 189) - is what helps the decisions to stand the test of time and serve the objectives

of the agreement. The WTO Appellate Body has referred to this approach as an attempt at “locating and marking out a line of equilibrium.”<sup>13</sup> This is an approach that is evolutive, and in particular, pays attention to the significance of time (Blackett, 2002; Blackett, 1999).

This kind of analysis is distinct from an analysis of the parties’ intent in concluding the free trade agreement. It works within the strictures of the VCLT - even acknowledging “the paucity of tools that treaty interpreters have to ascertain... meaning” (Bjorklund, 2017/2018: 47). It takes all of the elements of the balancing test seriously, leaving interpretive room to consider a labour chapter that reaffirms obligations as members of the ILO, and commitments under the 1998 Declaration. The ILO constitution including the ILO’s 1944 constitutional annex, the Declaration Concerning the Aims and Purposes of the ILO (Declaration of Philadelphia) and the 1998 Declaration include robust visions of “fair competition” that could help to distill the ordinary meaning in context of “a manner affecting trade”. The panel does not engage in an analysis of “fair competition” that would frame these principles – and their concrete manifestations in core ILS, as relevant to the interpretation of Article 16.2.1 of the labour chapter of CAFTA-DR.

It was the source of some surprise to observers that the panel did not consider itself to be empowered to give significant credence to international labour law (ILL). Under Article 1.2.2 CAFTA-DR, “The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.” Article 16.1 specifically articulates CAFTA-DR members’ shared commitments, as they concern their obligations as members of the ILO and their commitments under the 1998 Declaration. Yet the U.S. attempt to introduce ILO reports, as well as a 2009 ILO Technical Memorandum offering a diagnostic undertaken by the Guatemalan Ministry of

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<sup>13</sup> *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (Complaint by India, Malaysia, Pakistan, and Thailand) (1998) WTO Doc. WT/DS58/AB/R (Appellate Body Report).

Labour to improve its labour inspection system, appears to have been minimalist, at best evidencing that the ILO had also noted inaction similar to that alleged (LPR, para. 269).

The panel, citing Article 31.3 of the VCLT, which clarifies that together with the context, the Panel should take into account “any relevant rules of international law applicable in relations between the parties,” acknowledged that CAFTA-DR parties are all members of the ILO. It paraphrased Article 16.1 CAFTA-DR to affirm that treaty members “are bound by an obligation” in the 1998 Declaration and the ILO Constitution to “respect, promote and realize” fundamental principles and rights at work. It considered that “[t]he interpretation by the relevant committees of the ILO” offer a “clear understanding” of the severity of retaliatory measures and the need for “prompt and effective redress” (LPR, para. 427). That reference to the ILO was not the beginning of a discussion, but rather the conclusion to the section establishing that Guatemala had failed to effectively enforce labour laws within the meaning of Article 16.2.1(a) CAFTA-DR. There is no other reference to this principle of treaty interpretation, or substantive discussion of ILL in the case. Instead, in its interpretation of “in a manner affecting trade”, the panel only acknowledges that to limit the ambit of Article 16.2.1(a) to “labor laws that produced effects on prices or quantities sold in international trade” would make the proof of trade effects “practically impossible” and as a result inconsistent with Article 16.1 as well as Article 1.2.1(c)’s objective to promote fair conditions of competition (LPR, paras. 176, 178-179). The panel similarly, and rightly, rejected the suggestion that the test should focus on “intentionality.”

The panel reasoned that “[a] failure to effectively enforce labor laws may affect costs, risks or potential liabilities associated with production processes so as to provide a potential competitive advantage to producers that fail to comply with labor laws” (LPR, para. 172). But the panel only acknowledged that minimally, labour laws might impose administrative costs on employers, and over time might raise labour costs (minimum wage laws and occupational health

and safety protections are identified). In other words, although the panel repeatedly suggests that it is adopting an objectives-based, systemic approach, it comes away from the textual analysis with an approach that some commentators might classify as an inward-looking, and narrowly legalistic response (see Pauwelyn & Elsig, 2013, p. 460). It ultimately leaves the labour law contextualization behind. And while the line of demarcation between the two approaches is imperfect, and each may claim some limited rooting in an interpretation of the VCLT, the challenge comes from a failure to grapple with the meaning of having a labour chapter as an integral part of the trade agreement. For if including labour in a chapter of a free trade agreement, rather than presenting it as a side agreement as in NAFTA, is more than a cosmetic change to the way free trade agreements are to be understood, how does the difference get understood through the interpretation that is offered to its terms? To ask this more precisely, and in relation to the terms of the agreement, is the interpretation of the labour chapter not to be seen as one of the specific elaborations of the principles and rules that gives meaning to the objectives identified in Article 1.2.1 of CAFTA-DR?

Inclusion of a labour chapter in the CAFTA-DR, and in similar free trade agreements, should be understood to mean more. CAFTA-DR is not simply the recipient of established “trade” interpretations; rather, it is contributing to them through the recognition that labour is not an “add on” subject to trade. For ILO Members to affirm in the organization’s constitution that “labour is not a commodity” is not hyperbole, but an instantiation of a vision of the intimate link between the social and the economy. Drawing on Pauwelyn and Elsig (2013, p. 463), it might be analyzed as a form of interest divergence, which serves to increase interpretative space for the decision-making panel.<sup>14</sup> Part of the interpretative space they created, of course, comes

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<sup>14</sup> Pauwelyn and Elsig’s suggestion that “young” tribunals concerned about “bias” concerns might act more timidly than more established institutions might resonate here (*ibid.*, p.467). However, the WTO Appellate Body almost immediately challenged the more originalist and roundly criticized interpretations of pre-WTO Agreement

from the ability to rely, as the VCLT provides, on international law and in the context of a labour chapter that references it, ILL.

From this close analysis of the LPR, some interpretive space exists to yield an outcome attentive to the deep integration of the social in the economic. But the multiple procedural and analytical hurdles to arriving at anything close to a recalibration recall the historical enjeu: if the provision and its interpretation reflect a “failure by design” (Drake, 2017) – that is, the labour provisions were not designed to yield an alternative mediation, or social regionalism. My argument takes us beyond the conclusion that the challenge is in the decision to leave trade dispute resolution largely to state parties (Cross, 2017; and in Europe, Bronckers and Gruni, 2019); states create regions, but how they understand what those regions should and can do, and how they conceptualize the proper governance of labour, is central. Social regionalism opens up the prospect of seeking more than an additional governance level for a form of ‘judicial review’ of the enforcement of domestic law.

Georges Abi-Saab offers the prescient reminder that institutions tend to evolve over time, and in the ongoing, iterative process, their interpretations might evolve too (Abi-Saab, 2010, p.102). If a panel considers the labour chapter to be an intimate part of the whole including the objectives of trade, and engages with the interdependency of the members of the agreement – including across the development divide – it can yield more satisfying interpretations. Or, it can show why the governance level – failure to enforce – does not sufficiently challenge the political misframing labour as ‘naturally’ a domestic governance matter only supported by the regional. In this sense, it is less than clear that a panel can operate, through interpretation alone, to re-establish an equilibrium, transnationally.

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GATT panels, reliant on dictionary definitions and *travaux préparatoires*, adopting a rigorous and rooted approach to the VCLT (Blackett, 1999; Lang, 2011; Namgoong, 2019).

The LPR report has certainly spurred some experimentation (Compa, 2019) and led to dramatic changes in the newly ratified United States-Mexico – Canada Agreement (USMCA) that include a rapid-response mechanism on the freedom of association. Yet the gravity of the initial violations left untouched and unresolved has made a deeper examination unavoidable (Lenox & Arsht, 2018). Even though the USMCA is in many ways considered the “gold standard” for renegotiated texts (Santos, 2019), authors are increasingly acknowledging that the distributive justice dimension cannot be avoided (Shaffer, 2019; Meyer 2017). Without rejecting labour chapters, social regionalism shifts the focus to a “new settlement” of social democracy in transnational economic governance (Held, 2001/2000: 405).

### Part III: Social Regionalism as a Transnational Labour Law Response

Social dimensions approaches to linkage are undermined by the presumption that labour is fundamentally a local governance matter, and that redistributive policies should be purely domestic concerns. Throughout my ongoing work on the trade-labour interface, I have addressed the historical approaches of regionalism and argued for a thick vision of development (Blackett, 2002; 2010; 2015; 2019a; 2019b). This paper foregrounds instead my concern to take seriously the prospect that labour is in fact misframed as a purely or even primarily domestic governance matter, and instead, to rethink the political representation at the level best befitting the analysis (Fraser, 2009). Social regionalism as a normative concept reconsiders how so-called ‘intermediate’ spaces – including those that already bind trading partners together – may be rethought.

Social regionalism does not necessarily seek to transpose and recreate a renewed ‘embedded liberal’ compromise from within a 20th century paradigm. The context is distinct, and there is no blueprint. Regional integration is a “polity-creating process” (Marks, Hooghe and Blank, 1996, p.346), one that is capable of retaining the local even as it builds the transnational (Thomas, 2020/2019, p.33). Political arenas are interconnected, rather than

exclusively nested in the national governance levels (Craig, 2011). The “multiple, overlapping layers of norm-creation and norm-application” (Hepple, 2005, p.275) so familiar to labour lawyers accustomed to theorizing workplace governance are particularly important in a shifting global architecture. The distributive justice conversation – a dialogic process (Boisson de Chazournes, 2015) - needs to happen across rather than exclusively within one polity, and have bridging the development divide in labour law and social protection at its core.

Some would of course respond to the encasing of the economic transnationally by curtailing it as the way to regain control over labour, domestically (Ronzoni 2016). This is an argument for return to strong states, not unlike Rodrik’s similarly important counter-current response to the regulatory trilemma that prevents democracy, sovereignty and globalization from coexisting: to recognize that the nation state is really “the only game in town when it comes to providing the regulatory and legitimizing arrangements on which markets rely”, by increasing domestic latitude for action and contextualized experimentation (Rodrik, 2018: 13).<sup>15</sup> These analyses helpfully challenge received understandings of trade patterns, industrialization-based model of development, (Rodrik, 2018), and particular detachments of cosmopolitan liberalism from actual governing polities (Ronzoni 2016).

These analyses also have real limits. First, the return to domestic policy space as a response to the legal architecture on international economic law operates through trade law interpretation, and calls for deference run the risk of being illusory. Moreover, even absent international economic law as such, states must consider the impact and reactions of other foreign actors on individual states’ actions. They respond to the economic and political pressures to which they are subjected (Lang, 2011, p.344).

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<sup>15</sup> In response to comments on his book, Rodrik has acknowledged not being averse to experimentations that seek to create “new forms of political allegiance” but concerned to ensure local responsibility (Rodrik, 2019, p.61).

Second, would that these proposals could grapple more directly with the regulatory consequences of the hardening asymmetry between trading partners, and the structural challenges developing countries face when they attempt to experiment without redistributive capacity. Abandoning transnational adjustment and advocating policy space for domestic actors accentuates a similar tendency – stronger economies in multilateral or regional contexts seek the policy space they can exercise while leaving weaker economies to sort out their distributions on their own. The nature, role and dedicated resources for technical cooperation in CAFTA-DR countries (Public Report of Review, 2009) – should be part of this discussion. Sometimes the targeted assistance can be woven into preferential trading agreements, notably the Better Work initiatives that combine technical cooperation to small open economies to build and continuously improve the labour conditions in a heavily export oriented sector with market access (Blackett 2015).

Third, the trade literature has tended to prefer adjustment assistance as a trade-consistent measure that encourages change, while acknowledging the need for compensation to industries or factors of production that have faced dislocation (Trebilcock, Chandler and Howse, 1990; Corden, 2006; Trebilcock, 2014). While there might be a hope that developing countries could undertake trade adjustment rather than resort to safeguard measures or other trade remedies (McRae 2005, p.610), ultimately it is through increased, transnational support to trade policy-related adjustment assistance for developing countries that there can be realistic signs of movement. Acknowledging Corden's conservative social welfare function is not a luxury; in other words, there is a justice claim in workers' long understood expectation that they would be able to maintain a certain standard of living and their children improve it. That justice claim has long been dashed in many parts of the global South. While trade adjustment policies are dismissed as too little, too late by Rodrik (2018), Shaffer has recently argued for adjustment policies to offset the risks of globalization and rapid technological change. He proposes conditioning the development and retention of social security to trade, and some form of job

“flexicurity”, albeit ultimately operating domestically (Shaffer, 2019, pp. 22 – 24; but see Ashiagbor, 2006). He has also proposed that trade agreements should incorporate by reference separately negotiated international tax treaties, with a view to enhancing social welfare policies that the breakdown of embedded liberalism policies render more difficult to support (Shaffer, 2019, pp. 20-22).

Other scholars have started to engage with redistribution within the framework of trade agreements. In particular Meyer offers pragmatic reasons to explain why the asymmetry between domestic trade adjustment measures has doomed them to failure in the U.S. context (Meyer 2017, pp. 1010-11; see also Shaffer, 2019, p. 25). He argues for economic development chapters to be included in trade agreements - commitments of “new money” in the agreements to support development and address the effects of trade-related dislocations (p. 1014). The commitments would be subjected to dispute settlement. The goal would be to “tie the hands of domestic legislatures by linking trade liberalization with domestic policies that share the gains from trade” (p. 1024). For Shaffer, while there is significant policy latitude for experimentation, “the core idea is that trade agreements will only be sustainable if states commit to distribute economic gains broadly” (Shaffer, 2019, p.25).

I would add that redistribution, within a trade agreement that takes labour seriously, should go beyond obligations on one’s own state enforceable by another; they need to entail commitments to other states within regions as a form of transnational redistribution. They need to create the space to break down the encasing of the economic in a way that seals out the social. This form of redistribution would problematize the methodological nationalism that allows labour to be thought of as ‘naturally’ a domestic governance matter.

## Conclusion

This article has drawn on the LPR to frame the importance of a shift in approach, to social regionalism. It has historicized social regionalism as an intellectual response to the breakdown of the embedded liberal bargain and the encasing of an international economic order that was designed to prevent the governance of the social in the economic, transnationally. It has considered social regionalism's potential contribution to trade interpretation, and the importance of rebuilding redistributive mechanisms and international solidarity into trade agreements. Indeed, it may still be the "great variety of forms in which the 'collectivist' countermovement" appears, built on the "broad range of the vital social interests affected by the expanding market mechanisms" (Polanyi, 1944/2001 p.151) that gives rise to critical experimentation (De Sousa Santos and Rodriguez-Garavito, 2005). For the turn to the regional is not simply a transferral or a loss and to conceive of it as a diminution of national power is to misapprehend the existing interaction of governance levels (Held, 2001/2000). Social regionalism permits multiple geometry; it permits a politics of the possible through labour-trade negotiations, and in interpretation. Social regionalism holds the contested potential both to build on the ILO's constitutional *acquis* at an interpretative level, and to re-centre redistribution, transnationally.

It may seem paradoxical to argue for deepened regional distribution in a moment of crisis that seems to have led to closed border policies and an intense hardening of national borders to all but narrowly understood nationals, even within well-defined geopolitical spaces of regional agreements (Frenkel, 2020). But this is a moment in which the needs to maintain society – quite literally – have required the economy virtually to stop. The terms of any return are shaped through collective and deeply transnationalized resistance, along familiar fault-lines of the race and precarity of the workers deemed essential. It is precisely in a moment of heightened awareness of our profound interdependency that the space-opening, transformative

ethos of social regionalism in transnational labour law is most needed. Labour is not a trade “add on” but an intimate part of how we understand the social in the economic. We must rethink the allocation of risk, preventing market economy from becoming market society (Cunningham, 2005). This moment of discontent reminds us that we forget this insight at our peril.

On social regionalism in transnational labour law.

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